FARAD CONTINUATION SHEET No.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
NAGPUR BENCH AT NAGPUR

Second Appeal No. 47/2006
(*Smt.Sakhubai Shamrao Barai & another* **VERSUS** *Kawadu Mangaru Dhake***)**

Office Notes, Office Memoranda of Coram, appearances, Court's orders of directions and Registrar's orders	Court's or Judge's orders

Shri Modak, Advocate for the appellant.
Shri Bhutada, Advocate for the respondent.

CORAM : Smt. Vasanti A. Naik, J.
DATE : 18th July, 2007.

Heard learned counsel for the parties.

The appellants are the original defendant. A suit was filed by the plaintiff/respondent for seeking a decree of specific performance of contract or in the alternative refund of the earnest amount. According to the plaintiff he had entered into an agreement of sale dated 17.02.1995 with Tukaram, the father of the defendants, who agreed to sell the suit house to the plaintiff for a consideration of Rs. 88,000/-. According to the plaintiffs, Tukaram died in the year 1999 and the defendant, who are the legal heirs of Tukaram, refused to perform their part of the contract and to execute the sale-deed in favour of the plaintiff. The plaintiff, therefore, filed the aforesaid suit.

The defendants denied the claim of the plaintiff and further denied that their father, Tuksram, agreed to sell

the suit property to the plaintiff and that he had received Rs. 85,000/- towards earnest amount. According to the defendants, the suit was barred by limitation, and therefore, they prayed for the dismissal of the suit.

The trial Court framed the necessary issues and held that the plaintiff had proved that Tukaram had agreed to sell the suit property to the plaintiff for Rs.88,000/- and the plaintiff had paid an amount of Rs.85,000/- to deceased Tukaram. The Court, however, refused to grant a decree of specific performance of contract in favour of the plaintiff and instead granted a decree for refund of earnest money.

The appellants/defendants challenged the judgment passed by the trial Court in an appeal. The appeal filed by the defendants was dismissed by the 2nd Ad-hoc Additional District Judge, Bhandara by the judgment dated 17.10.2005. Both the Courts held that the suit filed by the plaintiff was not barred by limitation.

Shri Modak, the learned counsel for the appellant, submitted that the suit filed by the plaintiff was clearly barred by Article 54 of the Limitation Act, 1963 as the suit was not filed within a period of three years from the date on which the plaintiff had notice of refusal on the part of the defendants to perform their part of the contract. It is

submitted on behalf of the appellant that in the legal notice issued by the plaintiff to the defendant, it was stated that the plaintiff approached the father of the defendants but the sale-deed could not be executed. According to the counsel for the appellants, this clearly showed that the plaintiff had approached the defendants' father on earlier occasions and the plaintiff was aware that the defendants' father had refused to perform his part of the contract.

Both the Courts have recorded a finding that the suit filed by the plaintiff was not barred by the provisions of the Limitation Act. The reliance of the defendants on the legal notice dated 20.05.2000 to show that the plaintiff had notice that the defendants' father had refused specific performance is not justified. It is merely stated in the notice that in spite of repeated requests, Tukaram could not come to Bhandara to execute the sale-deed and ultimately died in the year 1999. No other evidence is brought on record to show that the plaintiff had notice or knowledge about the refusal on the part of the defendants' father to perform his part of the contract. In the absence of any such evidence, it cannot be said that the suit filed by the plaintiff was barred by limitation. Admittedly, in this case, no date was fixed in the agreement of sale for execution of the sale-deed and it

was only after the legal notice dated 20.05.2000was received by the defendants, the plaintiff got the knowledge that the defendants have refused to perform their part of the contract.

The findings recorded by both the Courts on the question of limitation are based on the proper appreciation of the evidence on record.

Since no substantial question of law arises for consideration in this second appeal, the same is dismissed with no order as to costs.

JUDGE

APTE